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Supreme Court of the United States

October Term, 1965

No. 198

HELEN PRATT STUFF,

Petitioner,

AGAINST

E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered on March 2, 1965.

I

Opinions and Judgments Below

Memorandum opinion of the United States District Court for the Southern District of New York, dated and entered September 19, 1962, not officially reported (Appendix A).

Final decree of the United States District Court for the Southern District of New York, dated and entered October 3, 1962 (Appendix B).

Opinion of the United States Court of Appeals for the Second Circuit, dated and entered March 2, 1965, officially reported at 342 F. 2d 143 (Appendix C).

Final judgment of the United States Court of Appeals for the Second Circuit, dated and entered March 2, 1965 (Appendix D).

II

Statement of the Grounds on Which Jurisdiction of This Court Is Invoked

(i) The opinion and judgment of the Court of Appeals herein sought to be reviewed were dated and entered on March 2, 1965 (Appendices C and D).

(ii) There has been no order respecting a rehearing or an extension of time within which to petition for certiorari.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1):

> "§ 1254. *Courts of appeals; certiorari; appeal; certified questions.*
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Review is sought pursuant to Rule 19.1.(b) of the Supreme Court Rules:

> "Rule 19. *Considerations governing review on certiorari.*
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> • • • • •
>
> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; • • • or has decided an important question of federal law which has not been, but should be, settled by this court:"

III

Question Presented for Review

May dedication[1] to the public of a copyrighted work be inferred from a finding that the copyright owner had been "derelict in preventing others from infringing his copyright" (as now held by the Second Circuit[2]) or must abandonment[1] of rights gained under the Copyright Law

---

1. "Dedication" and "abandonment" appear to be used interchangeably in the sense both "seem to suggest purposeful release to the public" (*Public Affairs Associates* v. *Rickover*, 284 F. 2d 262, 269, n. 26 (C. A. D. C. 1960) vacated 369 U. S. 111; 82 S. Ct. 580 (1962) and "an intentional surrender" (*National Comics Publications* v. *Fawcett Publications*, 191 F. 2d 594, 598 (2 Cir. 1951).

2. *Stuff* v. *E. C. Publications, et al*, 342 F. 2d 143, 145 (2 Cir. 1965) to which the present petition is directed (Appendix C herein).

be "manifested by some overt act indicative of a purpose to surrender the rights and allow the public to copy" (as previously held by the Ninth Circuit[1])?

IV

The Constitutional and Statutory Provisions Involved in the Present Case

United States Constitution, Article I, Section 8, Clause 8:

> "The Congress shall have Power
>
> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

17 U. S. C. 1(a):

> "§1. *Exclusive rights as to copyrighted works*
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> "(a) To print, reprint, publish, copy, and vend the copyrighted work;"

17 U. S. C. 10:

> "§10. *Publication of work with notice*
>
> "Any person entitled thereto by this title may secure copyright for his work by publication there-

1. *Hampton* v. *Paramount Pictures Corporation*, 279 F. 2d 100, 104 (9 Cir. 1960).

of with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, * * *."

17 U. S. C. 24:

"§24. *Duration; renewal and extension*

"The copyright secured by this title shall endure for twenty-eight years from the date of first publication, * * * *And provided further,* That in the case of any other copyrighted work, * * * the author of such work, if still living, or the widow * * * if the author be not living, * * * shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years * * *."

V

Statement of the Case

A. Proceedings in the Courts Below

This is an action for copyright infringement instituted on August 27, 1958 in the United States District Court for the Southern District of New York. The case was tried to the Court without a jury on January 25-26, 1962. On February 26, 1962 the case was reopened for the admission of additional exhibits introduced by the plaintiff (petitioner herein). On September 19, 1962 the District Court filed a memorandum opinion (Appendix A herein) in favor of the defendants (respondents herein). Final decree for the defendants was entered in the District Court on October 3, 1962 (Appendix B herein).

Appeal to the United States Court of Appeals for the Second Circuit was duly filed by the plaintiff on October 19, 1962, and on October 31, 1962 defendants filed a cross-appeal. The appeal was argued on January 13, 1965, and on March 2, 1965 the Court of Appeals filed an opinion (Appendix C herein) affirming the District Court. The judgment of the Court of Appeals (Appendix D) to which the present petition is directed, was duly entered on March 2, 1965.

B. Statement of Facts

The copyright in suit relates to a "print or pictorial illustration" depicting a grinning boy, first entitled "The Original Optimist" and then renamed "Me—Worry?" (PX 1A; P.A. 151a). The accused picture is also of a grinning boy, sometimes named "Alfred E. Neuman" and sometimes entitled "What—Me Worry?", and extensively published by the defendants in Mad Magazine (PX 4A-4E; P.A. 83-85; 89-90) and elsewhere (PX 5, 6, 7; P.A. 107-108).

On June 24, 1914 the "print or pictorial illustration" in suit, entitled "The Original Optimist" was published in the United States (P.A. 170). On July 11, 1914 two copies of said work were deposited with the Register of Copyrights and copyright claim was made by Stuff and Wilson of 416 Union Street, Seattle, Washington (P.A. 170). Certificate of Copyright Registration No. K76154 was issued to the said Stuff and Wilson on said claim of copyright (P.A. 170; PX 1G).

The "print or pictorial illustration" covered by said Certificate of Registration was entered in evidence as Plaintiff's Exhibit 1A. Printed on said exhibits are the title "The Original Optimist", the copyright notice "Copyright 1914 Stuff & Wilson", and the name of the

printer "The Stuff Printing Concern, Seattle". Stamped on the back of the print are two Copyright Office notations, "JUL 11 1914" and CL K 76154".

The Certificate of Copyright Registration and the print identified therewith (PX 1G and 1A) were among Stuff's original records and were found by plaintiff (petitioner) at the time of his death among his effects and papers (P.A. 139, 143, 148, 149).

The copyrighted print appears to have been sold extensively throughout the country mainly under the name "Me—Worry!" (PX 12A-12W).

Stuff appears to have been fully aware of his statutory rights under the copyright in suit.[1] Nevertheless, the only

1. Plaintiff's Exhibit 1C for Identification (P.A. 172) is an incomplete letter in Stuff's handwriting dated November 24, 1915 (P.A. 139, 168), reading as follows:

HARRY S. STUFF
Originator of Selling Plans
Advertising Service
SAN FRANCISCO

Los Angeles, Nov. 24, 1915

Mr. I. N Hahn
1124 Washington Avenue
St. Louis

Dear Sir I have been beseiged [sic] with requests to use our copyrighted "Me-Worry" picture for advertising purposes.

I have repeatedly and uniformly denied such requests as it affects our sales. When we have exhausted the market we will offer it as a calendar subject, probably. I do not know of the Drug store in L.A. using it—and I am sure I would like to see a copy of the American Products Co. similar subject.

A copyright is for the sole purpose of protection and we are not being treated fairly by such infringements upon our rights.

So long as the picture is purchased at retail through our agencies, we of course cannot control what the buyer puts on it, but if our sales are being damaged by such use the law provides ample

evidence in the record of Stuff's prosecution of infringers of the copyrighted print to the time of his death in 1938 consists of a printing plate of what appears to be a counterfeit of the copyrighted print, and wrapping paper enclosing said plate and bearing the following legend in Stuff's handwriting (PX 12V-12W; P.A. 185-186):

INFRINGEMENT
DO NOT
USE
DESTROY after
suit is settled
recd.
Sept. 1—32
from
Atty.
[name indecipherable]

Both Stuff and Wilson, copyright registrants, died prior to the expiration date of the copyright term, Wilson having died first and Stuff in 1938 (P. A. 134). All of Stuff's copyright interests were bequeathed to his widow, petitioner herein, by will dated June 12, 1936 and admitted to probate on January 8, 1941 in the County Court of Buffalo County, Nebraska (PX F; P. A. 145).

Petitioner renewed the copyright and the certificate of copyright registration renewal was duly issued on October 10, 1941 (PX 1H; P. A. 153).

Petitioner has diligently pursued known infringers of the copyright in suit. One such infringement action was instituted as early as 1941. See *Stuff* v. *La Budde Feed & Grain Co.*, 42 F. S. 493 (D. C. Wis., 1941), wherein the present copyright was held to be valid and petitioner was held entitled to sue for infringement thereof. Unreported actions were also instituted in the United States District Courts in Cleveland, Ohio and Chattanooga, Tennessee

(P. A. 39). Petitioner's counsel "pursued every infringer that we have found starting back in 1948 and running right down to the present time" (P. A. 39).

The accused "Alfred E. Neuman" and "What-Me Worry?" picture has been published in Mad Magazine commencing with its December 1954 issue (PX 4A-4E; P. A. 83, 86, 89). The accused picture also appears on various articles such as sweatshirts, statuettes, masks, jewelry, simulated straitjackets, books and prints either sold or authorized by respondents (PX 5, 6, 7; P. A. 108). The District Court found that the accused picture is "almost an exact copy" of the copyrighted print and that "there is such similarity between the two works that, absent an exculpatory explanation, the inference of copying infringement is compelled. No amount of coincidence could explain the striking resemblance" (P. A. 189).

In January 1958 the accused "Alfred E. Neuman" picture came to the attention of counsel for petitioner, and he promptly gave notice of infringement of the copyright in suit to the respondents (PX 8; P. A. 38). In March 1958 a second notice of infringement was given to the respondents (DX Q; P. A. 93). Respondents continued to publish the accused picture (P. A. 94) and on August 27, 1958 the present action was commenced (P. A. 1). Respondents continued to publish the accused picture during the entire pendency of this action (P. A. 94).

According to the respondents, the source of the accused picture was a photocopy (DX M1, M2) of a missing post card which in some unexplained way came into respondents' possession (P. A. 92). There was no testimony or evidence as to whether there was any printed matter on the missing post card (P. A. 101), such as a copyright notice. Respondents "took no steps to ascertain whether it [the picture on photocopy M1 and M2] was protected by copy-

right or otherwise" (P. A. 105). Respondents did not make it a practice to ascertain whether any of the material which they intended using in Mad Magazine was protected either by copyright or trademark or otherwise (P. A. 109).

The District Court found that

> "many copies of plaintiff's prints were circulated without the requisite [copyright] notice prior to the time when defendants first published the accused cartoon" (P. A. 190-191).

The District Court further found that

> "the very existence of such a volume of nearly identical prints without the required notice over so long a period suggests either that the copyright owner authorized or acquiesced in their wide circulation" (P. A. 191).

The District Court concluded that

> "the plaintiff's husband had been most derelict in preventing others from infringing his copyright" (P. A. 192).

The Court of Appeals affirmed the District Court as follows (342 F. 2d 143, at pp. 144-145):

> "The court, however, found it established that a great volume of nearly identical prints had appeared over a long period and that plaintiff's husband had been most derelict in preventing others from infringing his copyright. These findings, borne out by the evidence, support the inference suggested by the trial court that the copyright owner authorized or acquiesced in the wide circu-

lation of the copies without notice. On this record we must hold that defendants have met their burden of showing circulation of copies without notice, acquiesced in by the copyright holder. See Nimmer, supra, §146. The caricature was thereby dedicated to the public, barring any suit for infringement by plaintiff."

C. Basis for Federal Jurisdiction in the Court of First Instance

Federal jurisdiction was based on 28 U. S. C. 1338(a) which provides as follows:

"§1338. *Patents, copyrights, trademarks, and unfair competition.*

"(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

VI

Reasons for Allowance of the Writ

1. The petition presents a Federal question of widespread public interest and concern which has not heretofore been determined by this Court.

2. The petition presents a question of fundamental copyright law on which the Court of Appeals for the Second Circuit has rendered a decision in direct conflict with a decision of the Court of Appeals for the Ninth Circuit.

3. Stated generally, the question is whether rights gained under the Copyright Law may be lost by failure to police the copyright.

4. The Second Circuit has answered this question in the affirmative (Appendix C herein) by affirming "the inference suggested by the trial court that the copyright owner authorized or acquiesced in the wide circulation of the copies without notice" and concluding that the copyrighted work "was thereby dedicated to the public".

5. The Ninth Circuit, on the other hand, has answered this question in the negative in *Hampton* v. *Paramount Pictures Corporation*, 279 F. 2d 100, 104 (9 Cir. 1960), as follows:

> "Rights gained under the Copyright Law, 17 U. S. C. A. §1 et seq., may be abandoned. Abandonment of such rights, however, must be manifested by some overt act indicative of a purpose to surrender the rights and allow the public to copy."

6. The decision of the Second Circuit (Appendix C) to which the present petition is directed appears to conflict not only with the above-cited decision of the Ninth Circuit, but it also seems to run counter to other Second Circuit decisions:

> *H. M. Kolbe Co.* v. *Armgus Textile Company*, 315 F. 2d 70, 74 (2 Cir. 1963);
> *National Comics Publications* v. *Fawcett Publications*, 191 F. 2d 594, 598 (2 Cir. 1951);
> *Gerlach-Barklow Co.* v. *Morris & Bendien*, 23 F. 2d 159, 162 (2 Cir. 1927).

7. Thus, in the *Kolbe*, case, *supra* (315 F. 2d at p. 74), the Second Circuit held that:

> "Section 10 does not impose upon copyright proprietors the duty of policing the distribution of pirated works. * * *
>
> "Hence as the copyright proprietor has no affirmative duty to police subsequent distributions of his *own* products, *a fortiori* he has no affirmative duty with respect to subsequent distributions of copies which were never authorized by him to be distributed."

8. The United States District Court for the Southern District of New York has gone even further and has held that the Court does not have the power, and the copyright owner does not have the right, to enjoin the unauthorized removal of a copyright notice from a copyrighted work, *Scarves by Vera* v. *American Handbags*, 188 F. S. 255, 257 (D. C. N. Y. 1960):

> "Plaintiff's argument is that when defendant purchases towels or linens embodying plaintiff's copyrighted marks and removes the copyright notice and utilizes said towels or linens in the manufacture of ladies handbags which are sold to the public, the defendant is placing the copyrighted designs in the public domain, exposing them to use by the public and thereby destroying plaintiff's copyright. Plaintiff's argument falls short, however, because defendant by its actions cannot place plaintiff's copyrighted designs in the public domain."

9. The Supreme Court has not spoken with respect to the question herein presented for review as applied to the

law of copyrights. However, it has spoken with respect to precisely the same question as applied to the law of patents, *Shaw* v. *Cooper*, 32 U. S. 292, 321 (1833):

> "The acquiescence of an inventor in the public use of his invention, can in no case be presumed, where he has no knowledge of such use. But this knowledge may be presumed from the circumstances of the case. This will, in general, be a fact for the jury. And if the inventor do not, immediately after this notice, assert his right, it is such evidence of acquiescence in the public use, as for ever afterwards to prevent him from asserting it. After his right shall be perfected by a patent, no presumption arises against it from a subsequent use by the public."

10. Walker on Patents (Deller's Edition, Volume I, Page 368), citing *Shaw* v. *Cooper, supra,* and other authorities, states categorically that:

> "No abandonment of an invention after the issue of Letters Patent thereon has ever been judicially decided to exist in the United States."

11. It is respectfully submitted that this rule of law which the Supreme Court has applied to patents should also and with equal force be applied to copyrights.

Patents and copyrights are the twin children of a common parent, namely, Article I, Section 8, Clause 8 of the United States Constitution, and they are frequently treated alike. Thus, in *Kurlan* v. *Commissioner of Internal Revenue,* 343 F. 2d 625, 630 (2 Cir. 1965), the Second Circuit held that:

> "Despite infringement, a copyright or patent remains with its true owner who may always seek injunctive relief against further misuse."

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Memorandum Decision of District Court

(Appendix pp. 189-192)

(251)

MacMahon, *District Judge*

This is an action for copyright infringement. The copyright in issue is a print depicting a grinning boy entitled "The Original Optimist". The case was tried by the court without a jury. The copyright in issue was obtained originally by the plaintiff's husband on July 11, 1914 and was renewed in 1941 by the plaintiff who succeeded to her husband's interest after his death.

There is no public record of the copyrighted print because at the time the copyright was obtained it was the practice of the Copyright Office not to retain (252) the submitted copies but to return them to the registrant. Plaintiff's Exhibit 1-A, a print of a grinning boy, however, bears a stamp of the Copyright Office showing that it was one of two copies of the print originally submitted to the Copyright Office. This is sufficient to establish that Exhibit 1-A is the copyrighted work. *Gerlach-Barklow Co.* v. *Morris & Bendien,* 23 F. 2d 159, 162 (2 Cir. 1927).

A visual comparison of the accused picture, a cartoon of a grinning boy which the defendants have named "Alfred E. Neuman", with the copyrighted print shows that it is almost an exact copy. Thus, although there is no evidence that the defendants had access to plaintiff's work, there is such similarity between the two works that, absent an exculpatory explanation, the inference of copying and infringement is compelled. No amount of coincidence could explain the striking resemblance. *Wilkie* v. *Santly Bros.,* 91 F. 2d 978, 979 (2 Cir. 1937).

In the efforts to overcome the inference of copying, the defendants assert the similarity is accounted for by their access to other material published (253) before plaintiff's print. The defendants' evidence on this issue, however, falls far short of any such showing. See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 54 (2 Cir. 1936).

Defendants also argue that the copyright is invalid. They assert that plaintiff's print is not an original work of imagination, but a portrait of a living boy. This argument lacks merit. Although the evidence is clear that the plaintiff's print was inspired by a living model, it is equally clear that it is a caricature created by the imagination of the artist. But, even if the original artist had succeeded in creating an exact image of his subject, the print would still be copyrightable. *Detective Comics* v. *Bruns Publications*, 111 F. 2d 432, 433 (2 Cir. 1940). Further, the fact that the plaintiff's print was based on a living person would account for the similarity between it and the accused cartoon only if there were some showing that the defendants had modeled their cartoon from the same living model. There is no such evidence. On the contrary, defendants admittedly based their cartoon on Exhibit M-1 which, though not completely identical, is an obvious copy of the plaintiff's print.

(254)

Defendants next contend that the copyright is now invalid because the caption was changed by the copyright owner from "The Original Optimist" to "Me Worry?" There is no evidence explaining why or when this change was made, but neither is there any showing that the defendants have been misled in any way by the change. A new caption under such circumstances does not invalidate the copyright. *Collier* v. *Imp Films Co.*, 214 F. 272 (S.D.N.Y. 1913).

Finally, defendants point to the uncontradicted evidence that many copies of plaintiff's print were circulated without the requisite notice, prior to the time when defendants first published the accused cartoon. Indeed, there is uncontradicted evidence that prints identical to plaintiff's have been copyrighted by at least two other persons since 1914, and the court is convinced that defendants innocently copied Exhibit M-1 which does not bear a notice of copyright.

Plaintiff contends that, however innocent, defendants still must respond for infringement. She argues that defendants have the burden of proving that the copyright holder authorized circulation of plaintiff's print (255) without the required notice. The passage of so many years makes it virtually impossible for the defendants to meet any such burden. Nor do defendants need to do so. The plaintiff has the burden to show that all copies published by her deceased husband, or under his authority, bore the required copyright notice. *Forster Music Publisher, Inc.* v. *Fred Fisher Music Co., Inc.*, 63 U.S.P.Q. 112 (S.D.N.Y. 1944).

Although plaintiff need not present direct proof that each authorized copy contained the notice, she must introduce general proof of the precautions that were taken to inscribe the notices. See *Falk* v. *Gast Lith. & Eng. Co.*, 40 F. 168 (C.C.S.D.N.Y. 1889) and Amdur, *Copyright Law & Practice* 1066 (1936). Plaintiff has introduced no such evidence. On the contrary, the very existence of such a volume of nearly identical prints without the required notice over so long a period suggests either that the copyright owner authorized or acquiesced in their wide circulation. Since plaintiff has failed to prove this essential element of her case, judgment must be awarded to the (256) defendants.

Although, at first blush, this may seem to impose an unduly harsh burden on the plaintiff in the instant case, the alternative is to assign the defendants an even more impossible task. While the copyright law sometimes requires the innocent infringer to pay damages to a copyright holder, it should not be construed against an innocent infringer where the evidence so clearly shows that prior to copying there was no way to ascertain, and nothing even to suggest, that the print from which it copied was protected by a valid copyright.

Further, in the instant case, the defendants' inability to determine whether Exhibit M-1 was copyrighted, despite its lack of any copyright notice, was aggravated by the fact that the plaintiff's husband had been most derelict in preventing others from infringing his copyright. Neither equity nor fundamental fairness would be served by granting recovery against defendants under such circumstances. (257).

Accordingly, I find for the defendants. This memorandum constitutes the court's findings of fact and conclusions of law. Submit decree within ten (10) days.

So ordered.

Dated: New York, N. Y.
September 19, 1962

LLOYD F. MACMAHON
U. S. D. J.

APPENDIX B

Final Decree of District Court

(Appendix, p. 193)

(400)

This action having come on for trial before the Court, Honorable Lloyd F. MacMahon presiding, and the Court having rendered its Memorandum Decision in writing, dated September 19, 1962, ordering the entry of judgment in favor of the defendants, and providing for said Memorandum to constitute the Court's findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff's action be and the same is hereby dismissed on the merits and with prejudice and that the defendants recover of the plaintiff their taxable costs and disbursements in the action.

Dated at New York this 3rd day of October, 1962.

/s/ LLOYD F. MACMAHON
U.S.D.J.

J.A.M.

Judgment Entered October 3, 1962

HERBERT A. CHARLSON
Clerk

G.E.S.

APPENDIX C

Opinion of U. S. Court of Appeals, Second Circuit

SMITH, *Circuit Judge*:

Appellant, a holder of a United States copyright on a caricature of a grinning boy, sued defendants, publishers of "Mad" magazine for copyright infringement, in the United States District Court for the Southern District of New York. The Court, Lloyd F. MacMahon, *District Judge,* after trial without a jury, entered judgment dismissing the complaint on the merits. The Court held that the accused picture, a cartoon of a grinning boy to which defendants gave the name "Alfred E. Neuman" was a copy of plaintiff's caricature, "The Original Optimist," also known as "Me-Worry?". He held that plaintiff had the burden of establishing that all copies published by her husband, the original copyright holder, or under his authority, bore the required copyright notice, that she had failed to do so, and that her husband had been derelict in policing the copyright. While we do not necessarily agree with the precise scope of the ruling on burden of proof, the facts found make it clear that relief was properly denied, and we affirm the judgment. It is therefore unnecessary to consider defendants' cross appeal attacking certain of the court's findings.

Appellant's copyright issued in 1914 to her husband, to whom she was married in 1927. After her husband's death in 1938 appellant in 1941 renewed the copyright. Some 2,000 copies of the work had been sold between 1914 and 1920, none by the copyright holders thereafter. Between 1941 and 1948 appellant had received a total of $2,850 in settlement of a series of six claims for infringe-

ment. Pursuant to the practice at the time of the copyright, the two copies of the work filed in the copyright office had been returned to the owner. Many unauthorized copies of the print had circulated over the years without copyright notice before defendants copied. Identical prints had been copyrighted by at least two persons since 1914. Defendants were found to have copied innocently a copy published without a notice.

When plaintiff proved her ownership of the validly issued copyright and defendants' copying of the work, she established a prima facie case of infringement under the statute. *H. M. Kilbe Co.* v. *Armgus Textile Co.*, 315 F 2d 70 (2 Cir. 1963), *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F. 2d 487 (2 Cir. 1960). See Nimmer on Copyright §141.1; Amdur, Copyright Law and Practice, at 1052. The court, however, found it established that a great volume of nearly identical prints had appeared over a long period and that plaintiff's husband had been most derelict in preventing others from infringing his copyright. These findings, borne out by the evidence, support the inference suggested by the trial court that the copyright owner authorized or acquiesced in the wide circulation of the copies without notice. On this record we must hold that defendants have met their burden of showing circulation of copies without notice, acquiesced in by the copyright holder. See Nimmer, *supra*, §146. The caricature was thereby dedicated to the public, barring any suit for infringement by plaintiff.

The judgment dismissing the complaint is affirmed.

APPENDIX D

Judgment of U. S. Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of March one thousand nine hundred and sixty-five.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

[SAME TITLE]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 198

HELEN PRATT STUFF,

Petitioner,

against

E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1225

HELEN PRATT STUFF,

Petitioner,

against

E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The memorandum opinion of the District Court for the Southern District of New York, dated September 19, 1962, is not officially reported but is printed as Appendix A to the petition herein.

The opinion of the Court of Appeals for the Second Circuit, dated March 2, 1965, is officially reported at 342 F. 2d 143 and is printed as Appendix C. to the petition herein.

Jurisdiction

The judgment of the Court of Appeals was entered on March 2, 1965. The petition for writ of certiorari was filed on May 29, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether an infringement of copyright can be found where the copyright holder has failed to introduce any evidence that authorized copies of the work bore the required copyright notice or that any precautions were taken to inscribe such notices.

2. Whether an infringement can be found in the face of the trial court's holding (literally affirmed by the Court of Appeals) that the evidentiary facts in the record warranted the conclusion that the copyright owner had authorized or acquiesced in the widespread publication of the work by others.

Petitioner has described the question for review as being merely whether "dedication" to the public of a copyrighted work can be predicated upon the dereliction of the owner in preventing others from infringing it (Pet. p. 3). This limited characterization of the issue is inaccurate. Concepts of "dedication" or "abandonment" aside, the fact is that the trial court held on the basis of all the facts before it, that the copyright proprietor had "authorized" or "acquiesced" in the wide circulation of the work by

others, which ruling has been endorsed by the Court of Appeals. Thus, there is no apparent conflict between the Second and Ninth Circuits as petitioner suggests. To be sure, the Ninth Circuit decision in *Hampton* v. *Paramount Pictures Corporation,* 279 F. 2d 100, indicates that "abandonment" of the rights granted under the Copyright Law must be manifested by some overt act. But the opinion of the trial court here refers to "authorization" or "acquiescence" by the copyright owner—not naked "abandonment" (App. 189, 191)—and the affirming opinion of the Second Circuit Court of Appeals expressly states that its holding is based upon adequate proof below of that "acquiescence" (App. C to Pet., p. 22). The term "abandonment" is nowhere employed in the opinions of either the District or Appeals Courts in this case.

Statute Involved

The pertinent provisions of the Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, *et seq.*, U. S. C. Title 17) are §§1(a), 10 and 24 as set out in the petition herein (pp. 4, 5).

Statement of Facts

Respondents are the publishers and distributors of a satirical humorous magazine entitled "Mad" and various hard and soft-covered reprints thereof (Defts.' Exhs. K-1, 2, 3, 4, 5, 6; L-1 through L-17). Sometime prior to December, 1954, a post-card bearing the face of a moronic boy with the legend "What—Me Worry?" imprinted beneath was received from an anonymous source by the editorial

staff of "Mad". Said card bore no copyright notice (191a).* A photostat was made of it (Defts.' Exhs. M-1 and M-2) and it was reproduced once on the cover of the December, 1954 issue of the magazine (84a). For about three years prior to the commencement of this action, versions of the boy's face, derived from the aforesaid postcard (Defts.' Exhs. M-1, M-2), enhanced by color and various physiognomical detail supplied by "Mad's" artists, appeared on the cover of each issue of the magazine (85a, 86a, 89a, 92a, 119a).

Long before the inception of this action "Mad's" editors attempted to trace the origin of the face on the postcard that they had adopted as a "mascot". They inserted an item in the magazine inviting the aid of its readers in this quest (86a) and received an abundance of replies, generally of a facetious nature, as well as scores of photographs, prints and pictures of the same or very similar figures, none of which bore copyright notices of petitioner or her predecessor. Some of these pictures were reproduced in the magazine along with portions of the readers' letters (Defts.' Exhs. K-4, 5, 6).

In January, 1958, petitioner's New Jersey attorney wrote to respondents' counsel claiming copyright infringement (Pltff.'s Exh. 8). Respondents' attorney sought a copy of the work from the Copyright Office but was informed that the copies of the print originally deposited had been returned to the registrant a few weeks after they had been filed in 1914 (Defts.' Exh. O). Respondents sub-

* This and subsequent similar references are to Petitioner's (Appellant's) Appendix.

sequently received a further claim letter from petitioner's New York lawyers (Defts.' Exh. O). Upon demand of respondents' counsel, they furnished him with a copy of petitioner's print which bore no copyright notice (Defts.' Exhs. P-1, P-2). When the instant action was commenced, the complaint served did not have a copy of petitioner's print annexed (4a-9a; 95a). Shortly after this suit was begun, respondents were sued in the District Court for the Southern District of New York by one William A. Schmeck, who claimed a 1936 copyright on a print identical with petitioner's (Defts.' Exh. B; 95a). Almost simultaneously, respondents received claim letters and documents from one Ben Brotman who submitted data indicating that in 1950 he had obtained United States and Canadian copyrights on a print that was also an exact replica of petitioner's (Defts.' Exh. C). During the same period respondents were threatened with an infringement suit by one Harry Keir who possessed a copyright somewhat similar to petitioner's (Defts.' Exh. D).

Bewildered and amazed by the multiple infringement claims arising from their use of the boy's face involved in this action, respondents employed a researcher of old prints to trace the origin of the work in question (102a). He provided respondents with certain material indicating that a figure of a large-eared, gap-toothed, grinning boy, similar to petitioner's print, had made its public appearance years before petitioner's copyright. The researcher's efforts, supplemented by respondents', are reflected in a collection of material received in evidence in support of respondents' claim that petitioner's copyright lacked originality (Defts.' Exh. A).

During the past few decades, pictures either identical with, or very similar to, petitioner's print have been widely circulated throughout the United States by individuals and firms for a large variety of commercial purposes, none of which bears petitioner's copyright notice. Some of these carry evidences of purported copyright by third persons (Defts.' Exh. E); many, many more are without copyright legend of any kind (Defts.' Exh. H). Identical copies of petitioner's print without copyright notice appear framed under glass (Defts.' Exh. F) and scattered through the text of a book entitled "Hall of Fame", published in 1943 (Defts.' Exh. G). A bust reminiscent of the face on petitioner's copyrighted print and a doll equally similar in appearance were also received in evidence as further examples of the universal use that has been made of the property claimed by petitioner to be hers exclusively (Defts.' Exhs. I, J).

Petitioner married the copyright registrant in 1927. From that date until at least the time of her examination before trial in 1959, neither she nor her husband had caused any copies of the print to be published or sold nor had he or she licensed anyone else to engage in such activities (150a, 159a). From 1938 when her husband died, until her said examination before trial, petitioner did not derive any income from the printing or sale of copies of the print nor did she license any other parties to exploit the property in any manner (159a). Indeed, petitioner acknowledged that from the time of her marriage in 1927 to the time of her husband's death in 1938, she knew of no business activity of any kind relating to the copyright that had been conducted by her husband at any time (161a). The total

commercial exploitation of the copyrighted print was limited to a handful of transactions between 1914 and 1920 which involved the aggregate sale of some 2,000 copies of the work (Pltff.'s Exhs. 12-f–12-s).

Two ancient photographs of apparent early twentieth century vintage were introduced into evidence by petitioner, both of which consisted of store windows containing displays of prints portraying the boy appearing on petitioner's work. One of these (Pltff.'s Exh. 1-E) clearly depicts the legend "Me Worry" inscribed beneath the figure of the boy and above this designation there appears a thin line of type which evidently consists of a copyright notice. The other, and apparently older photograph (Pltff.'s Exh. 1-D), likewise reveals the inscription "Me Worry" beneath the figure, but even with the use of a magnifying lens employed at the trial, no trace of any copyright notice was discernible (98a-99a).

Petitioner did not at any time claim or attempt to prove at the trial that any of the respondents was aware of the existence of her copyright prior to the institution of the suit, and the denial by respondent Gaines of any such knowledge stands uncontroverted (100a).

Petitioner's copyright, originally issued to her husband in 1914, was renewed by her in 1941. From 1941 through 1948 she collected the aggregate sum of $2,850 from the settlement of six separate claims of infringement (158a). None of these settlements was the result of any court judgment or adjudication of the validity of the copyright (43a). In one action brought by her (*Stuff* v. *LaBudde Feed &*

Grain Co., 42 F. Supp. 493) defendant's motion to dismiss the complaint for non-joinder of parties and on the ground that the work was not copyrightable was denied without adjudication or determination of any issues on the merits (44a). The case was thereafter settled for $900 (156a), which amount is included in the gross collections by petitioner of the aforesaid sum of $2,850 through settlement of unlitigated claims of infringement.

Petitioner offered no evidence at the trial to establish that all authorized copies of the print had borne the requisite copyright notice or that any precautions had been taken in that direction so as to comply with the requirements of the Copyright statute. Indeed, such evidence as was introduced by the petitioner herself tended to negate such compliance, for the old photograph of the store window (Pltff.'s Exh. 1-D) contained numerous copies of the print which revealed no copyright notices thereon, even with the aid of a magnifying glass. Moreover, the scores of copies of the print produced at the trial by respondents, bearing copyright notices by many different persons, or none at all, confirmed that petitioner's print had probably been published without proper notice or had been published before the copyright had been secured (Defts.' Exhs. B, C, D, E, F, G, H).

The Decisions Below

The District Court's memorandum decision clearly states that the judgment for the respondents was based upon petitioner's utter failure to prove that authorized copies of the print had borne the requisite copyright notice. The Court stated, further, that such evidence as was in the record contrarily indicated that the existence of so many prints without the required notice for so long a time was the probable product of the copyright owner's authorization or acquiescence. Thus, the Court declared (Pet. p. 18):

> "The plaintiff has the burden to show that all copies published by her deceased husband, or under his authority, bore the required copyright notice. *Forster Music Publisher, Inc.* v. *Fred Fisher Music Co., Inc.*, 63 U.S.P.Q. 112 (S.D.N.Y. 1944).
>
> "Although plaintiff need not present direct proof that each authorized copy contained the notice, she must introduce general proof of the precautions that were taken to inscribe the notices. See *Falk* v. *Gast. Lith. & Eng. Co.*, 40 F. 168 (C.C.S.D.N.Y. 1889) and Amdur, *Copyright Law & Practice* 1066 (1936). Plaintiff has introduced no such evidence. On the contrary, the very existence of such a volume of nearly identical prints without the required notice over so long a period suggests either that the copyright owner authorized or acquiesced in their wide circulation. Since plaintiff has failed to prove this essential element of her case, judgment must be awarded to the (256) defendants."

The opinion of the Court of Appeals expresses its affirmance of the District Court's determination, as follows (Pet. p. 22):

> "On this record we must hold that the defendants have met their burden of showing circulation of copies without notice, acquiesced in by the copyright holder."

A reading of both opinions below clearly indicates that the Court of Appeals differed with the District Court only to the extent that it questioned, without ultimately deciding, whether the petitioner or respondents had the burden of proof on the question relating to the circulation of copies of the print without copyright notice. The Court of Appeals affirmed because it determined that, regardless of whose burden it was, the respondents had shouldered and carried it successfully.

It is noteworthy that the District Court's memorandum does not speak of "abandonment" or "dedication" and the Court of Appeals does not employ the term "abandonment" in its opinion. The last sentence of the Appeals Court's opinion utilizes the word "dedicated", but obviously only for the purpose of characterizing the effect of petitioner's "acquiescence" already determined to have been proven by the evidence.

Respondents filed a cross-appeal from a number of adverse rulings of the District Court despite its holding in their favor (196a). The Court of Appeals expressly stated that it was not considering the questions raised on said cross-appeal, declaring (Pet. p. 21):

> "* * * the facts found make it clear that relief was properly denied, and we affirm the judgment. It is therefore unnecessary to consider defendants' cross-appeal attacking certain of the court's findings."

Under the circumstances, the granting of the writ sought by petitioner herein and this Court's subsequent review would not finally dispose of this case even if petitioner's contentions were given judicial recognition and approval.

Reasons for Not Allowing the Writ

1. The decision below was based upon extensive findings of fact by the trial court. The quality and quantity of those findings of fact were approvingly cited by the Appeals Court to justify its affirmance. It is not the function of this Court to review cases that have been decided on the basis of the impact of factual evidence.

2. There are no unique or unusual questions presented. The principle relied on by the District Court requiring petitioner to prove that authorized copies of the print bore copyright notice is fundamental. *Falk* v. *Gast. Lith. & Eng. Co.*, 40 F. 168 (C. C. S. D. N. Y. 1889); *Forster Music Publisher, Inc.* v. *Fred Fisher Music Co., Inc.*, 63 U. S. P. Q. 112 (S. D. N. Y. 1944); *Kraft* v. *Cohen*, 117 F. 2d 579 (C. A. 3rd 1941); *Harms Inc.* v. *Pure Milk Ass'n*, 37 U. S. P. Q. 575 (N. D. Ill. 1938); Amdur, *Copyright Law & Practice* 1066 (1936); *Nimmer on Copyright*, §139.2. And even if the burden of proving circulation of copies of the print without notice was on the respondents, that burden was more than adequately met by the evidence adduced at the trial. The Appeals Court so concluded after reviewing the entire record (Pet. p. 22).

3. There is no actual conflict between the Second and Ninth Circuits on the subject of the effect of failure to police copyrights. The decision below was not predicated upon a finding of abandonment of the copyright because of petitioner's failure to prosecute other infringements, but was based upon factual evidence that satisfied both the District and the Appeals Courts that the copyright owners had authorized or acquiesced in the mass circulation for a long period of time of copies not bearing any notice. *Peter Pan Fabrics Inc.* v. *Acadia Co.*, 173 F. Supp. 292 (S. D. N. Y. 1959); *Scarves by Vera Inc.* v. *United Merchants and Mfrs., Inc.*, 173 F. Supp. 625 (S. D. N. Y. 1959); *B. & B. Auto Supply Inc.* v. *Plesser*, 133 U. S. P. Q. 247 (S. D. N. Y. 1962); *Nimmer on Copyright*, §139.2. Under the circumstances no unusual or controversial doctrine is involved.

4. Petitioner's counsel, in his over-zealous efforts to obtain a writ from this Court, has been less than fair in referring in his petition to an unfinished and unmailed letter allegedly written by petitioner's deceased husband in 1915 (Pet. p. 7 [footnote]). This instrument was refused admission into evidence by the District Court because it was not a proven ancient document, had never been completed and mailed and was self-serving (24a-27a). Counsel's reference to the rejected "letter" to support his argument seems irregular at the least. In any event, the fact that said letter was not completed and never mailed supports an inference exactly opposite to that which petitioner urges, for its non-mailing suggests that the author of the "letter" acquiesced in the very "infringements" he purportedly deplored. Consequently, the exhibit in question,

if worthy of any judicial attention, adds persuasive evidence to that relied upon by the courts below to support the determination that the copyright owner had "acquiesced" in the wide circulation of the print in suit.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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